87-1867 (1)

Supreme Court, U.S.
FILED
MAY 6 1988
JOSEPH F. SPANIOL, JR.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

SANDRA TURNER, ET AL.

PETITIONERS

v.

LINDA MCMAHON, OTIS R. BOWEN, ET AL.

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK N. AARONSON
ATTORNEY OF RECORD
San Francison Lawyers Committee
for Urban Affairs
301 Mission St., Suite 400
San Francisco, Calif. 94105
(415) 543-9444

MARK GREENBERG
RICHARD A. ROTHSCHILD
Western Center on Law and Poverty, Inc.
3535 W. 6th St.
Los Angeles, Calif. 90020
(213) 487-7211

MARILYN KAPLAN
Orrick, Herrington & Sutcliffe
600 Montgomery St.
San Francisco, Calif. 94111
(415) 392-1122

52

QUESTION PRESENTED

Whether Congress withdrew the equitable jurisdiction of federal district courts to determine who should bear the costs of an injunction subsequently reversed when Congress mandated that states recover any "overpayments" received by Aid to Families with Dependent Children (AFDC) recipients.

PARTIES TO THE PROCEEDING

Debra Scruggs and Jerrylean Baker are also plaintiffs. Plaintiffs-Petitioners proceed on behalf of a certified class composed of past, present and future California AFDC recipients who have been or will be affected by the policy and practice of considering mandatory payroll deductions such as federal and state income tax, state disability insurance (SDI) and FICA withholding as income currently and actually available in calculating grants and determining eligibility.

Defendant Linda McMahon is the Director of the California Department of Social Services. Other Defendants are the California Department of Social Services, Jesse Huff, Director of the California Department of Finance, and the California Department of Finance.

Otis R. Bowen, Third-Party Defendant-Respondent, is the Secretary of the United States Department of Health and Human Services.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING. ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT. 2

REASONS FOR GRANTING THE PETITION. . . .11

I. THE COURT OF APPEALS IMPROPERLY CONSTRUED SECTION 402(a)(22) TO EFFECT A WITHDRAWAL OF A DISTRICT COURT'S EQUITABLE JURISDICTION TO DECIDE WHO BEARS THE COSTS OF A REVERSED INJUNCTION 12

A. Deciding who bears the costs of a reversed injunction is an essential part of a court's equity jurisdiction. 13

B. The Court of Appeals' decision divests a district court from jurisdiction to decide who bears the costs of a reversed injunction.. 16

C. The Court of Appeals erred in construing a statute to effect an incursion into a court's equitable powers absent an explicit statement from Congress.. 19

D. Curtailment of a district court's equitable discretion will cause serious harm to AFDC recipients, and will constrict their access to the federal courts. 24

II. THE COURT OF APPEALS' CONSTRUCTION OF SECTION 402(a)(22) MISCONSTRUES CONGRESSIONAL INTENT ON AN ISSUE OF CRITICAL IMPORTANCE TO THE AFDC PROGRAM 30

A. The Court of Appeals erred in concluding Section 402(a)(22) has a plain meaning that necessarily includes court-ordered payments within the definition of overpayments. . .31

B. The Court of Appeals erred in failing to interpret Section 402(a)(22) in light of evidence of Congressional purpose.. 35

CONCLUSION 43

TABLE OF AUTHORITIES

Page(s)

Cases

Arkadelphia Milling Co. v. St. Louis Southwestern R.R. Co., 249 U.S. 134 (1918). 8, 13, 16

Atlantic Coast Line Ry. Co. v. Florida, 295 U.S. 301 (1935). 14

Brown v. Swann, 10 Pet. 496 (1836) . . .22

Crowell v. Benson, 285 U.S. 22 (1932). 22

Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979). 41

Detroit Newspaper Publishers Assn. v. Detroit Typographic Union, 471 F.2d 872 (6th Cir. 1972), cert. denied, 411 U.S. 967 (1973). 41

Edelman v. Jordan, 415 U.S. 651 (1974). 29

Federal Power Commission v. Interstate Natural Gas, 336 U.S. 577 (1949) 14

W.R. Grace and Co. v. Local Union 759, 461 U.S. 757 (1983). . . .16

Hecht Co. v. Bowles, 321 U.S. 321 (1944). 12, 20, 22

Heckler v. Turner, 468 U.S. 1305 (1984) 3

Heckler v. Turner, 470 U.S. 184 (1985). 3

Inland Steel Co. v. United States, 306 U.S. 153 (1939) 14

Lopez v. Heckler, 713 F. 2d 1432 (9th Cir.), rev. in part on other grounds, 463 U.S. 11328 (1983). 15

Maine v. Thiboutot, 448 U.S. 1 (1980). 6

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 12, 19

Turner v. Prod, 707 F.2d 1109 (9th Cir. 1983). 3

Turner v. Woods, 559 F. Supp. 603 (N.D.Cal. 1982). 3

United States v. Morgan, 307 U.S. 183 (1939) 14

Watt v. Alaska, 451 U.S. 259 (1981). 38

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) . . .12, 19, 21, 22

Statutes

28 U.S.C. §1254(1) 1

28 U.S.C. §1331. 7

28 U.S.C. §1343(3) 7

28 U.S.C. §1343(4) 7

33 U.S.C. §1251 et seq.. 21

42 U.S.C. §602(a)(22) . . . . . .passim

42 U.S.C. §603(i). 33

42 U.S.C. §1983. 6

45 C.F.R. §205.10(a)(6). 26

45 C.F.R. §233.20(a)(13)(i). 26, 32

45 C.F.R. §233.20(a)(13)(i)(A) . . . 5, 24

45 C.F.R. §233.20(a)(13)(i)(B) . . . 5, 24

45 C.F.R. §233.20(a)(13)(vi) 18

AFDC Statute, Sections 402 and 403 34

Social Security Act, Section 402(a)(22) . . . . . .passim

Social Security Act, Section 403(i) 33

Social Security Act, Section 403(i)(1)(C). 35

Miscellaneous Authorities

Article III, United States Constitution 22

Calif. Dept. of Social Services Manual of Policies and Procedures §44-350. 24

Emergency Price Control Act of 1942, Section 205(a), 56 Stat. 23, 50 U.S.C. App.Supp II, §§901, 925 20

Fed. R. Civ. Proc. Rule 23 27

Health and Human Services Action Transmittal No. SSA-AT-85-10. 4

Omnibus Budget Reconciliation Act (OBRA) of 1981, 95 Stat. 856-57 31

Report of the Senate Finance Committee, S. Rep. No. 97-139, 97th Cong., 1st Sess., pp. 519-520. . . .36, 37, 38
Senate Finance Committee Print No. 97-5, 97th Cong., 1st Sess., at p. 41 39

Testimony before the Subcommittee on Public Assistance and Unemployment Compensation, Committee on Ways and Means, House of Representatives 39

U.S. Code Cong. & Admin. News, 396, 785-86 39

Petitioners petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals from which petitioners seek a writ of certiorari is reported at 830 F.2d 1003. App. 1[1] That opinion reverses the unreported decision of the district court. App. 30.

JURISDICTION

The decision of the court of appeals was entered on October 16, 1987. A petition for rehearing and rehearing en banc was denied on February 22, 1988. App. 58. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. §1254(1).

---

[1] "App." refers to the Appendix filed along with the Petition for Certiorari.

STATUTE INVOLVED

Section 402(a)(22) of the Social Security Act, 42 U.S.C. §602(a)(22) provides:

> A state plan for aid and services to needy families with children must . . .
>
> (22) provide that the State agency will promptly take all necessary steps to correct any overpayment or underpayment of aid under the State plan . . .

The full text of Section 402(a)(22) is located at App. 62.

STATEMENT

This proceeding arose when California, acting under instructions of the U.S. Department of Health and Human Services, began to treat as overpayments AFDC benefits paid pursuant to a federal district court injunction after that injunction was reversed on appeal. The state sought to recover these funds by using the mandatory and automatic provisions of Section 402(a)(22) of the Social Security Act. Under Section 402(a)(22), states reduce monthly grants to current recipients and

initiate collection action against former recipients to recover program overpayments.

The original dispute in this case concerned procedures for determining AFDC benefits for working poor families in California. On July 29, 1982, the district court issued a permanent injunction providing that, when California calculated AFDC eligibility and benefits for working families, the state should not treat funds withheld for mandatory payroll deductions as income to the families. Turner v. Woods, 559 F. Supp. 603 (N.D. Cal. 1982). The Ninth Circuit affirmed the district court's injunctive order. Turner v. Prod, 707 F.2d 1109 (9th Cir. 1983). The injunction was stayed, per order of Justice Rehnquist, on July 19, 1984. Heckler v. Turner, 468 U.S. 1305 (1984). Thereafter, this Court reversed the judgment of the Ninth Circuit. Heckler v. Turner, 470 U.S. 184 (1985).

As a result of this series of deci-

sions, members of the Turner class had their AFDC benefits calculated without treating mandatory payroll deductions as income from September 1982, when the district court's injunction was implemented, until September 1984, when the stay of the injunction issued by Justice Rehnquist was implemented.

On April 30, 1985, the Secretary of Health and Human Services issued Action Transmittal No. SSA-AT-85-10. App. 11. The Action Transmittal directed states to recover as AFDC "overpayments" benefits paid where mandatory payroll deductions had been disregarded.

California then began its administrative procedures for overpayment recovery. Under those procedures, enacted under the authority of Section 402(a)(22), California would reduce AFDC grants for current recipients to a level which would leave each affected family with a total income of

90% of the state's AFDC payment level.[2] California would proceed against class members no longer receiving AFDC by use of collection letters, and "appropriate action under state law." See App. 32; 45 C.F.R. §233.20(a)(13)(i)(B).

Plaintiffs sought relief from the district court to prevent the state from using the procedures adopted under Section 402(a)(22) to recover the benefits paid pursuant to the court's injunction. Plaintiffs acknowledged that the state could petition the district court for an order requiring restitution of benefits paid under the injunction. However, plaintiffs denied that the state could circumvent the court's equitable powers by unilaterally reducing the AFDC grants of

---

[2] 45 C.F.R. §233.20(a)(13)(i)(A) provides that a state, when recovering an overpayment, may reduce the family's grant to a level where the combination of the assistance unit's aid, other income, and liquid resources equal 90% of the AFDC amount payable to an assistance unit of the same composition with no income. App. 65.

class members to recover the funds at issue.

Plaintiffs asked the district court to prohibit the state from recovering pursuant to Section 402(a)(22) the benefits paid to plaintiff class members under the reversed injunction. In the alternative, plaintiffs sought leave to file a supplemental complaint specifically adding a cause of action challenging the state's interpretation and application of Section 402(a)(22). The district court granted plaintiffs' motion to file a supplemental complaint; the state answered and named the federal government as a third-party defendant; and the parties filed cross motions for summary judgment.

Subject matter jurisdiction properly lay in the district court under 28 U.S.C. §§1331, 1343(3) and 1343(4), and plaintiffs had a cognizable claim for relief under 42 U.S.C. 1983. Maine v. Thiboutot, 448 U.S. 1 (1980).

The district court granted summary judgment and injunctive relief for plaintiffs. App. 32. The district court first held that payment made pursuant to a permanent injunction are not "overpayments" within the meaning of Section 402(a)(22). App. 43. Reviewing the history of section 402(a)(22), the court concluded that "[n]othing in this legislative history suggests Congress intended to require states to recover funds paid pursuant to a court-ordered injunction." App. 42. Rather, the legislative history made clear that the purpose of the provision was to require states to recover "overpayments" resulting from recipient or agency error. Congress, by mandating correction of overpayments and underpayments, was seeking to minimize errors by AFDC recipients and program administrators. The statutory provision was not intended to address the circumstances of payments made pursuant to court order. App. 33-43.

While the state had not petitioned for restitution, the state had made equitable arguments in support of its attempts to use Section 402(a)(22) to recover the court-ordered payments. In response, the district court addressed these equitable arguments. Under equitable principles of relief, a court may order a party who obtains benefits from an improperly issued injunction to restore the benefits to the other party. Arkadelphia Milling Co. v. St. Louis Southwestern R.R. Co., 249 U.S. 134, 145 (1918); App. 45-47. In balancing the harms between the parties, the court observed that the effect of a 10% grant reduction would be "near catastrophic" for class members. App. 48. The harm that would be suffered by the government in the absence of recoupment was less severe than that to be suffered by individual plaintiffs should recoupment proceed. App. 49. Further, the fact that the initial action was brought in good faith on a legal issue

in dispute was also relevant to the equities. App. 50.

The district court enjoined California from instituting collection efforts pursuant to Section 402(a)(22) against class members who had benefited from the reversed injunction. App. 52. Since the state had made no petition for restitution, the court had no occasion to decide that issue. App. 44, 50, n.3.

The court of appeals reversed the district court's decision. App. 1; 830 F.2d 1003. It held that the plain meaning of "overpayment" included benefits paid out pursuant to court order. It then "examined the legislative history for the sole purpose of determining whether, notwithstanding the plain language of the statute, there is a clearly expressed intention to exclude recoupment of overpayments made pursuant to court order." App. 21-22; 830 F.2d at 1008. Finding no reference to payments under court order in the legisla-

tive history, the court concluded California could directly recoup benefits paid under the injunction court order through its Section 402(a)(22) procedures. The appellate court rejected plaintiffs' assertion that Section 402(a)(22), as construed, effected a curtailment of the district court's equitable jurisdiction to determine who should bear the costs of a reversed injunction. App. 26-27; 830 F.2d at 1009. The Court viewed Section 402(a)(22) as not limiting a district court's equitable jurisdiction; rather, the court viewed Section 402(a)(22) as merely expanding the remedies available to a state to recover overpayments. The court of appeals also observed that if an individual were dissatisfied with the decision of the welfare department, he or she could seek an administrative hearing and subsequent state judicial review of the hearing decision. App. 26; 830 F.2d at 1008.

REASONS FOR GRANTING THE PETITION

This case raises the important issue of whether, absent an express statement by Congress, a statute may be construed to curtail the equitable discretion of district courts to manage the effects of injunctive relief. If the Ninth Circuit's opinion is allowed to stand, it will serve as precedent for the principle that a restriction on the equitable powers of the courts may be inferred from Congressional silence. The decision breaks with past decisions of this court, which hold that abrupt departures from traditional equity practice are not to be implied. It creates a novel exception to the continuing equitable jurisdiction of a district court after an appellate reversal.

The Court should grant certiorari for two reasons. First, the decision of the court of appeals is irreconcilable with the principle that construing a statute to limit a court's equitable powers when based

on anything less than an explicit statement by Congress is highly disfavored. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982); Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944). Second, the decision misapplies the plain meaning rule of statutory construction, and thereby misconstrues Congressional intent on an issue of critical importance to the national administration of the AFDC Program.

I. THE COURT OF APPEALS IMPROPERLY CONSTRUED SECTION 402(a)(22) TO EFFECT A WITHDRAWAL OF A DISTRICT COURT'S EQUITABLE JURISDICTION TO DECIDE WHO BEARS THE COSTS OF A REVERSED INJUNCTION

Historically, a court that grants an injunction has had the equitable discretion to determine who bears the burden of a reversed injunction. Under the court of appeals' decision, this aspect of equitable jurisdiction will no longer apply in AFDC litigation. Instead, states will invoke,

on their own initiative, the overpayment recovery procedures of Section 402(a)(22) to recoup funds paid under an AFDC injunction. The state will act without regard to whether the district court views this result as comporting with principles of equity. In short, the states in AFDC cases will be able to circumvent the full equitable jurisdiction of district courts. The court of appeals upheld this encroachment despite a legislative record giving no hint that Congress had contemplated such a result.

A. Deciding who bears the costs of a reversed injunction is an essential part of a court's equity jurisdiction.

It is well settled that the ability of a court "to correct that which has been wrongfully done by virtue of its process" is one of its inherent equitable powers. Arkadelphia Co., v. St. Louis Southwestern Ry. Co., 249 U.S. 134, 145-146 (1919). Ordinarily, a court which has issued

injunctive relief, modified or reversed on appeal, has broad authority to undo the effects of the earlier order so long as it acts in accord with equitable principles that protect all interests affected-including the public interest. Federal Power Commission v. Interstate Natural Gas, 336 U.S. 577, 582-83 (1949); United States v. Morgan, 307 U.S. 183, 191 (1939); Inland Steel Co. v. United States, 306 U.S. 153, 157 (1939). Restitution under these circumstances is not an absolute right. It is "ex gratia, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it..." Atlantic Coast Line Ry. Co. v. Florida, 295 U.S. 301, 310 (1935) (citations omitted).

This equitable discretion is an essential attribute of the court's equity jurisdiction. A court in a welfare case as in other cases, decides whether to grant an injunction after considering the merits of

the legal argument, the relative hardships for the affected parties and the public interest. See Lopez v. Heckler, 713 F.2d 1432, 1435-36 (9th Cir.), rev. in part on other grounds, 463 U.S. 11328 (1983). The remedial decision to grant an injunction is separate from the judgment on the merits of the plaintiff's claim. If a balancing of the hardships and the public interest do not favor the granting of the injunction, a court will not order it. Hecht Co. v. Bowles, 321 U.S. 321, 326, 331 (1944). The court also has the authority to stay the injunction pending appellate review.[3] The presumption is that absent a bond or a stay, the parties against whom an injunction issues bear the economic consequences

---

[3] In the Ninth Circuit, the "standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction." Lopez, 713 F.2d at 1435. The critical elements in deciding whether to grant a stay are the relative hardships to the parties and the public interest. Id. at 1435-36.

of compliance, no matter what happens on appeal, unless the issuing court after reversal exercises its equitable discretion to grant restitution on a claim of malicious prosecution or unjust enrichment. W.R. Grace and Co. v. Local Union 759, 461 U.S. 757, 770, n. 14 (1983); Arkadelphia, 249 U.S. at 134. The decision whether to grant an injunction initially, and decisions about how to distribute the costs of a reversed injunction both require a court to use its equitable powers.

B. The Court of Appeals' decision divests a district court from jurisdiction to decide who bears the costs of a reversed injunction.

The court of appeals' decision divests a court from the ability to determine who should bear the costs of a reversed injunction in an AFDC case. Its interpretation of Section 402(a)(22) lets state welfare agencies avoid district court jurisdiction after appellate reversal, since they are able to initiate collection procedures on

their own. Accordingly, a state need not confront a judicial weighing of the relative hardships and the public interest before acting against AFDC families who benefited from injunctive relief.

The court of appeals emphasized that an individual charged with an overpayment can seek an administrative hearing and subsequent state judicial review. App. 26; 830 F.2d at 1008. The court assumed that equitable concerns would receive the same consideration in these proceedings as if a claim for restitution had been brought by the state in federal district court. This impression is erroneous.

If a payment is held to be an "overpayment" within the meaning of Section 402(a)(22), a state has no discretion to decline collection activities as "inequitable." By its terms, the statute mandates recovery of "any" overpayment, with a single exception unrelated to equitable

considerations.[4] Accordingly, the only germane issues in administrative proceedings after a notice of overpayment are whether the particular family received an overpayment, the amount of the overpayment, and the amount to be recovered monthly. Subsequent state judicial review is limited to the same issues.

The Ninth Circuit erred when it characterized Section 402(a)(22) as merely expanding a state's remedies and not affecting judicial review. App. 27; 830 F.2d at 1009. Section 402(a)(22), as construed by the court of appeals, completely obviates the need to seek restitution from the court that issued the injunction. The decision of the court of appeals, in

---

[4] The statute provides that in the case of a former recipient with a non-fraud overpayment, a state may decline to make collection efforts if such efforts are not cost-effective, in accordance with dollar limitations prescribed by the Secretary. By regulation, the Secretary limits application of this provision to instances where the overpayment is less than $35. 45 C.F.R. §233.20(a)(13)(vi). App. 70-71.

effect, allows state administrative actions to preempt the authority of the courts to manage the consequences of equitable relief.

C. The Court of Appeals erred in construing a statute to effect an incursion into a court's equitable powers absent an explicit statement from Congress.

An abiding principle of statutory construction is that the comprehensiveness of a court's "equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). This Court repeatedly has held that statutory interpretations which suggest that Congress by implication has limited a court's inherent equitable powers are especially disfavored. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982); Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944). The expectation is that "if Congress desired to make...an abrupt

departure from traditional equity practice as is suggested, it would have made its desire plain." Hecht, at 330. Absent such an explicit statement, this Court has declined to construe legislation as withdrawing a court's equitable discretion even when Congress has sought to specify terms under which an injunction shall be issued.

For example, in Hecht, the Court construed language providing that "... upon a showing by the Administrator that such person has engaged or is about to engage in [certain specified acts] a permanent or temporary injunction, restraining order, or other order shall be granted without bond."[5] 321 U.S. at 322. Notwithstanding this language, the Court rejected the claim that the Administrator was entitled to issuance of an injunction on showing that the specified acts had occurred. 321 U.S.

---

[5] Section 205(a), Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C. App.Supp II, §§901, 925.

at 328. The Court explained:

> A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.

Id. at 329.

The point was reiterated in Romero-Barcelo, in which the Court rejected a claim that the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq., required a district court to immediately enjoin all discharges of pollutants that do not comply with the Act's permit requirements. 456 U.S. at 320. The Court declined to read the Act as forcelosing completely the exercise of the court's discretion. It explained:

> [W]e construe the statute at issue "in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress

has sought to protect."

Id. at 320, citing Hecht, 321 U.S. at 330.

The interest in avoiding a result which curtails the equitable powers of courts where Congress has made no explicit command has long roots in Anglo-American legal history. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." Brown v. Swann, 10 Pet. 496, 506 (1836). This caution is a necessary aspect of assuring the independence of the judiciary as required by Article III of the Constitution. It is, in addition, a way to avoid conflict and harmonize the separate powers of federal courts and Congress. Crowell v. Benson, 285 U.S. 22, 62 (1932).

Just as with Romero-Barcelo and Hecht, the instant case puts at issue the traditional equitable powers of a court. However, the approach taken by the Ninth Circuit stands in marked contrast with the

approach of Romero-Barcelo and Hecht.

Here, neither the language nor the legislative history of Section 402(a)(22) evidence any Congressional intent to curtail the equitable powers of district courts after reversals of injunctive orders. Congress merely directed state agencies to recover overpayments and correct underpayments, without defining either term. As discussed, infra, at 30-42, the legislative record for Section 402(a)(22) gave no suggestion that Congress sought to withdraw a court's traditional authority to decide what should be done after an injunction is reversed on appeal.

There is a substantial difference between the language Congress has used elsewhere when it sought to restrict the equitable discretion of ccurts and the language of Section 402(a)(22). Plaintiffs are aware of no other instance where an incursion into equity jurisdiction was found from language and legislative history

comparable to that presented here.

D. Curtailment of a district court's equitable discretion will cause serious harm to AFDC recipients, and will constrict their access to the federal courts.

If the court of appeals' decision stands, California will reduce AFDC grants for affected recipients to a level that leaves each affected family with a total income of 90% of the state's AFDC payment level. 45 C.F.R. §233.20(a)(13)(i)(A); App. 66-67; Calif. Dept. of Social Services Manual of Policies and Procedures §44-350. California will proceed against class members no longer receiving AFDC by "appropriate action under state law." 45 C.F.R. §233.20(a)(13)(i)(B), App. 67. The potential impact of these collection efforts on individuals living at subsistence levels of support is especially devastating.

For example, in 1986 when the question regarding the treatment of Turner I benefits as overpayments was before the dis-

trict court, class member Dorothy Lum received a monthly AFDC grant of $587 as the sole source of income for her two children and herself. She paid $490 for rent, a typical amount in the tight rental market in California cities for poor families not living in public housing or receiving other governmental subsidies. If the state lowered her AFDC assistance to 90% of the grant level for her family size, her assistance would have been $529 per month. After paying rent, this family of three would have had a total of $39 to meet every other monthly family expense.

In light of this type of impact, which would be repeated in numerous other individual situations, the district court found that the harm "suffered by the government in the absence of recoupment [was] less severe than that to be suffered by individual plaintiffs should recoupment pro-

ceed."[6] App. 49. It further commented that it was "extremely unlikely that AFDC recipients [would] have budgeted for the return of funds granted them by court order." App. 49.[7]

The harm caused by the court of appeals decision goes beyond the mere fact

---

[6] Though the district court discussed the equities, it expressly noted that there was no action for restitution before the court. App. 44. Accordingly, the portion of the Ninth Circuit's opinion stating that the district court held the state had no common law right of recoupment, (App. 15, 830 F.2d 1006), is simply erroneous.

[7] Payments made under court order in a class action are different from the more usual situation in AFDC administration, where a recipient who objects to action taken in his or her case may request an administrative fair hearing and may choose to receive aid paid pending the hearing. 45 C.F.R. §205.10(a)(6). Aid is paid regardless of the merits of the claim, and the recipient is required to repay the aid if he or she loses the hearing. 45 C.F.R. §233.20(a)(13)(i). In contrast, a recipient receiving benefits as a result of a class action decision, receives those benefits not because of a procedural opportunity irrespective of the claim, but because a court has held the recipient to be legally entitled to the benefits.

that affected families are forced to live at a level lower than the state-recognized standards of subsistence. The decision creates a chilling effect that will pervade all litigation around policies and practices of the AFDC program. Like the Lum family, other beneficiaries in class actions will find themselves innocent victims of monthly grant reductions because of appellate court reversals. Unlike litigants in other contexts, however, these individuals will not enjoy the protections of a court of equity before decisions are made to shift the costs of an eventually overturned injunction to them.

This result is particularly unfair to the unnamed class members. AFDC class actions typically proceed pursuant to Rule 23(b)(2), Fed. R. Civ. Proc. There is no requirement for class notice of the pendency of the proceeding. Absent a settlement or compromise, see Rule 23(e), there may be no notice at any stage of the proceeding.

There is no opportunity to opt out of the class. Yet months or years later, a scrupulously honest indigent family may be charged with a substantial overpayment if the injunctive relief is reversed.

The problem cannot be adequately resolved by orders requiring notice of pending proceedings. At any point, there may be a number of orders affecting AFDC program rules. Recipients are not able to evaluate the likelihood of ultimate appellate success for each pending case. Nor can they reasonably set aside a portion of each month's subsistence grant in a contingency fund in anticipation of possible appellate reversal. Nor can recipients or state agency workers continually calculate alternative budgets based on unknown future appellate dispositions.

The opinion imposes a Hobson's choice on program beneficiaries wishing to challenge alleged unlawful conduct. On the one hand, they can simply decline to seek any

injunctive relief until the case is finally resolved by this Court or until review is denied by this Court. If they prevail, they will have been denied desperately needed benefits for the number of years in which the case was litigated. Since the Eleventh Amendment prohibits a federal court from granting retroactive benefits absent state waiver, Edelman v. Jordan, 415 U.S. 651 (1974), the affected families will never receive the relief to which they were entitled.

On the other hand, if beneficiaries seek injunctive relief prior to final appellate disposition, there are potentially dire consequences for affected class members. So long as the case is pending at any stage in the courts, every family in the class will be at risk no matter how accurately it reports its circumstances, and no matter how carefully the family follows the law. If they are subjected to overpayment recoupment, they will have less

than the state-recognized minimum standards for the months or years in which overpayment recovery occurs.

The Court should grant certiorari to consider the correctness of a decision that so seriously impairs the ability of the district courts to do equity in managing the consequences of injunctive relief.

II. THE COURT OF APPEALS' CONSTRUCTION OF SECTION 402(a)(22) MISCONSTRUES CONGRESSIONAL INTENT ON AN ISSUE OF CRITICAL IMPORTANCE TO THE AFDC PROGRAM

The Ninth Circuit panel did not seek to construe Section 402(a)(22) in light of its purpose. Rather, it initially concluded that the funds at issue fell within the plain meaning of the term "overpayment." Having reached this conclusion, the Court of Appeal "examined the legislative history for the sole purpose of determining whether, notwithstanding the plain language of the statute, there is a clearly expressed intention to exclude recoupment of overpayments made pursuant to court order."

App. 21-22; 830 F.2d at 1008 (emphasis added).

This constricted approach to examining legislative history was erroneous. Had the Court reviewed the legislative history with a goal of determining Congressional intent, that history would have shown that Congress was neither addressing nor seeking to change treatment of AFDC benefits paid under a subsequently reversed court order.

A. The Court of Appeals erred in concluding Section 402(a)(22) has a plain meaning that necessarily includes court-ordered payments within the definition of overpayments.

Section 402(a)(22) was enacted as part of the Omnibus Budget Reconciliation Act (OBRA) of 1981, 95 Stat. 856-57. The critical statutory language states:

> A state plan for aid and services to needy families with children must...
>
> (22) provide that the State agency will promptly take all necessary steps to correct any overpayment or underpayment of aid under the State plan...

42 U.S.C. §602(a)(22). The statute does not define the term "overpayment." The implementing regulatory provision, like the statute itself, does not explicitly mention court-ordered benefits. 45 C.F.R. §233.20(a)(13)(i); App. 65.[8]

The court of appeals limited its review of the legislative history of Section 402(a)(22) because it concluded that the plain meaning of "overpayment" includes any payments made under a subsequently reversed court order. In reaching this conclusion, the Ninth Circuit focused on the adjective "any", and neglected to determine whether the term "overpayment" has a single plain meaning. However, the past and present practices of the Department of Health and Human Services (HHS), the agency charged with administering the

---

[8] The regulation provides "Overpayment means a financial assistance payment received by or for an assistance unit for the payment month which exceeds the amount for which that unit was eligible."

statute, do not support the notion that "overpayment," on its face, encompasses court-ordered benefits.

The term "overpayment" appears in both Sections 402 and 403 of the AFDC statute. HHS treats payments under a reversed court order as overpayments for purposes of Section 402, but not for purposes of Section 403. Section 403(i) of the Social Security Act, 42 U.S.C. §603(i), authorizes HHS to impose financial penalties on states for erroneous excess payments. The statute defines "erroneous excess payments" as including both payments to ineligible families and "overpayments to eligible families." Section 403(i)(1)(C). If "overpayments" necessarily include any payments made under a later-reversed court order, it would follow that HHS must impose fiscal sanctions on states for making court-ordered payments if the court order is later reversed. Yet HHS does not impose fiscal sanctions on states for making

payments under court order. If the same term is given a different meaning in different portions of the statute, then it cannot be said that the term has a single plain meaning.

A second indication that court-ordered payments are not within the plain meaning of the word "overpayment" is that HHS and state welfare agencies never treated them that way before this litigation. Before enactment of Section 402(a)(22) in 1981, there was no mandatory statutory requirement to recover overpayments. The states, however, had the authority to take such action. See former 45 C.F.R. §233.20(a)(12(i),(ii). Forty two states had an overpayment recovery policy. However, neither the federal nor state governments have identified a single case where the term "overpayment" was extended to court-ordered payments prior to this case.

A further indication that court

ordered payments are not within the plain meaning of the statutory term is that HHS still does not consistently interpret the provision to require all states to recover the funds paid pursuant to court order. HHS did not object to a stipulated settlement where the State of Washington agreed not to recover benefits paid under court order, in another case involving the identical legal issue concerning mandatory payroll deductions. See App. 43, n.2.

Absent a statutory definition, and in light of the inconsistent regulatory use, the term "overpayment" is not so clear as to justify the court's constricted examination of legislative history.

B. The Court of Appeals erred in failing to interpret Section 402(a)(22) in light of evidence of Congressional purpose.

Notwithstanding its belief that the term "overpayment" had a single plain meaning, the court of appeals still should have considered legislative history to

determine whether text which appeared unambiguous was ambiguous when considered in context. In Watt v. Alaska, 451 U.S. 259 (1981), this Court explained:

> We agree with the Secretary that "[t]he starting point in every case involving construction of a statute is the language itself." But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry. This is because the plain-meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.

451 U.S. at 265-66 (citations omitted).

The court of appeals should not have looked at legislative history for the "sole" purpose of determining whether Congress expressly excluded court ordered payments from the definition of "overpayment." Had the court reviewed the legislative history to determine Congressional purpose, it would have reached a different

result. The legislative history demonstrates that the explicitly stated purpose for enacting Section 402(a)(22) was to affect agency and recipient behavior so as to ensure correct program payments. There is no evidence of Congressional concern to alter who should bear the costs of a reversed injunction.

The most extensive discussion of the section's purpose appears in the Report of the Senate Finance Committee, S. Rep. No. 97-139, 97th Cong., 1st Sess., pp. 519-520, reprinted in [1981] U.S. Code Cong. & Admin. News, 396, 785-86. This report first summarizes the pre-1981 law and its limitations on correcting errors:

> Present law--There are no provisions in the statute specifying how States are to treat overpayments and underpayments. In practice, States are given the option of recouping overpayments, but are not required to do so...

The report next describes the Committee amendment:

> The Committee amendment would require States to take prompt

> action to correct both overpayments and underpayments...

It then explains the rationale for the policy revision:

> The Committee believes that a policy of insuring the correctness of payment is crucial if the AFDC program is to continue to have public support. By requiring the correction of both overpayments and underpayments, the Committee believes that recipients and welfare agencies alike will be assuring the accuracy of administration. Although States have been working to improve their administrative procedures and to reduce errors, the Committee notes that in the quality control measuring period April-September 1979, 23.5 percent of AFDC cases involved error. The total number of cases involving incorrect payments was 779,100....(Emphasis added.)

This discussion describes the errors to be addressed in terms of cases that would constitute errors for purposes of Quality Control, a concern which is wholly unrelated to treatment of payments made under court order.

Another Senate Finance Committee publication similarly emphasized that the purpose of Section 402(a)(22) was to create

incentives for both careful state agency practices and accurate recipient reporting:

> A mandatory recovery policy would act as an incentive for recipients to keep the welfare agency informed about their situation, and require States to take responsibility for correcting underpayments.

"Proposals for Reductions in Spending Programs under the Jurisdiction of the Senate Finance Committee," Senate Finance Committee Print No. 97-5, 97th Cong., 1st Sess., at p. 41.

Richard Schweiker, the HHS Secretary at the time of the introduction of the legislation, also explained the purpose of Section 402(a)(22) in the same terms: "As another matter of personal responsibility, we will require that AFDC overpayments be repaid. At the same time, of course, we will require States to make good on underpayments." Testimony before the Subcommittee on Public Assistance and Unemployment Compensation, Committee on Ways and Means, House of Representatives, March 11, 1981.

That the provision's goal was to reduce recipient and agency errors is also reflected in Congress' choice to mandate correction of underpayments as well as overpayments. Had the provision's primary goal been the saving of money, Congress would presumably not have mandated correction of underpayments. By directing states to correct both underpayments and overpayments, Congress maximized incentives for correct payments for both recipients and state agencies.

In sum, the stated purpose of Section 402(a)(22) was to make mandatory what had been permissive state practices regarding the correction of overpayments and underpayments so as to establish nationwide the same incentives for encouraging recipient and agency accuracy in welfare administration. This goal is not advanced by extending the overpayment recovery provision to payments made under a subsequently reversed court order. It is axiomatic that an

injunction is an order of the court and not attributable to the parties. Detroit Newspaper Publishers Assn. v. Detroit Typographic Union, 471 F.2d 872, 876 (6th Cir. 1972), cert. denied, 411 U.S. 967 (1973). When an injunction is in place, neither the state nor the recipient are engaged in erroneous conduct by complying with its terms.

This record demonstrates that the apparent "plain meaning" construction of overpayment relied on by the court of appeals is at odds with the legislative record. This evidence should have been taken into account by the Ninth Circuit but was not.

A court's duty is to determine what Congress intended to accomplish. "As in all cases of statutory construction, [a court's] task is to interpret the words of...statutes in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rights Org., 441 U.S. 600,

608 (1979).

The court of appeals' approach reflects the troubling results that emerge from an expansive application of the plain meaning rule. Certainly, an important goal of the plain meaning rule is to acknowledge that the best evidence of what Congress meant is what it said, and that courts should not reach contrary results through relying on obscure aspects of the legislative record. On the other hand, an expansive application of the rule may, and in this instance did, lead a court to construe a statute to obtain a result never contemplated by Congress.

A grant of certiorari will provide an opportunity for the Court to correct an erroneous decision that misapplies the plain meaning rule of statutory construction to reach a decision that is contrary to the intent of Congress.

CONCLUSION

Because of the significance of the court of appeals' holding on the administration of the AFDC program and on the equitable jurisdiction of the federal courts, plaintiffs respectfully request this Court to grant a writ of certiorari.

May 5, 1988

Respectfully submitted,

MARK AARONSON
ATTORNEY OF RECORD
San Francisco Lawyers Committee for Urban Affairs

RICHARD A. ROTHSCHILD
MARK GREENBERG
Western Center on Law and Poverty, Inc.

MARILYN KAPLAN
Orrick, Herrington & Sutcliffe